

Complaint

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IN THE MATTER OF

JOHN F. EBERHARD, WALTER J. KEAVNEY, AND
EDMUND DIAZCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4639. Complaint, Nov. 21, 1941—Decision, May 24, 1943*

Where three individuals, operating over a period of years through different corporations which successively became insolvent; engaged directly and through salesmen in securing signatures to contracts providing for the purchase of magazine subscriptions and scientific books, both selected by the purchaser from the list furnished, at specified combination or group prices—

- (a) Represented that purchasers under any of their combination or group offer plans would receive the books, magazines, and periodicals listed in such plan upon payment of the purchase price;
- (b) Represented that various books or magazines were given free to purchasers with their combination or group offer plans; and
- (c) Represented that the scientific books concerned were original, standard, unabridged editions expensively bound and printed, and worth at least \$6 a volume;

When in fact it was their frequent practice to collect the subscription price without making remission to the publishers of the periodicals requested, with the result that purchasers failed to receive any magazine or, in some instances, received only part of their selection, or other periodicals than those ordered; items which they represented as being free were in fact usually included by them in their group offers, the price being thus actually included in the regular price for the particular combination; and the scientific books in question were not original, standard, unabridged editions, and worth said amount, but were monographs or condensed articles by the authors named, printed on cheap paper and cheaply bound;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such representations were true and to induce it, because of such mistaken belief, to purchase their books and magazines offered as aforesaid:

Held, That said acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. J. W. Carter, Jr., for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that John F. Eberhard, Walter J. Keavney, and Edmund Diaz, individuals, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect

thereof would be in the public interest, hereby issues its complaint, stating its charges in this respect as follows:

PARAGRAPH 1. Respondent, John F. Eberhard, is an individual, residing at 148 Marcellus Road, Mineola, Long Island, N. Y.

Respondent, Walter J. Keavney, is an individual, whose business address is in care of the Transportation and Express Department of Time, Inc., 330 East Twenty-second Street, Chicago, Ill.

Respondent, Edmund Diaz, is an individual, doing business under the style and trade name of Physicians' Circulation Service with his principal place of business located at 11 West Forty-second Street, New York, N. Y.

PAR. 2. From October 1932 to July 1937, the Cyclopedia Corporation of America was actively engaged in selling and distributing certain combination or club offers consisting of scientific books and subscriptions to various magazines and periodicals, maintaining offices at 120 West Forty-second Street in the city of New York, N. Y. Although not originally members of this corporation, respondents, John B. Eberhard and Walter J. Keavney, prior to the year 1937, became associated with, and eventually took over, the entire business of this corporation. In 1937, due to financial difficulties, the corporation was forced to submit to its creditors a reorganization plan under the bankruptcy act. That plan was accepted by the creditors and resulted in the organization of the Professional Circulation Co., Inc., which took over the business formerly conducted by the Cyclopedia Corporation of America. Respondents, John F. Eberhard and Walter J. Keavney, together with respondent Edmund Diaz, were actively engaged in the operation of the Professional Circulation Co., Inc. In 1938, the Professional Circulation Co., Inc., made an assignment for the benefit of its creditors, and thereafter John F. Eberhard, Walter J. Keavney, and Edmund Diaz, as individuals, continued to operate the same business under the style and trade name of Professional Sales Corporation until the latter part of 1939, with their principal office and place of business located at 55 West Forty-second Street, New York, N. Y.

Respondents have acted in conjunction and in cooperation with each other, in performing the acts and practices hereinafter set forth.

PAR. 3. Acting in their individual capacities and as officers and representatives of the Cyclopedia Corporation of America prior to 1937, of the Professional Circulation Co., Inc., from 1937 to 1938, and trading under the style and firm name of Professional Sales Corporation until the latter part of 1939, respectively, respondents have engaged in the sale and distribution in commerce of scientific books, magazines, and periodicals under "Selected Group Offers" and have caused such

books and magazines, when sold, to be transported from the publisher's place of business to the purchasers thereof at their respective points of location in the various States of the United States and in the District of Columbia.

Respondents at all times mentioned herein have maintained a course of trade in said books and magazines in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of the aforesaid business, as aforesaid, respondents have engaged in the practice of representing: that purchasers of any of respondents' "Selected Group Offers" would receive the books and magazines listed in such "Selected Group Offers" upon the payment of the purchase price; that various books or magazines were given free to purchasers of respondents' various "Selected Group Offers"; that the books sold and distributed by respondents in or with the various "Selected Group Offers" were original, standard, unabridged editions, expensively bound and printed, and worth at least \$6 a volume; that the price at which respondents were offering their "Selected Group Offers" was less than the price usually charged by respondents for such "Selected Group Offers." The respondents have further represented as the publisher's regular price, for subscriptions to the various magazines listed in respondents' "Selected Group Offers," a sum larger than is actually charged by the publishers for such subscriptions.

PAR. 5. The foregoing representations, and others of a like nature but not specifically set out herein, were false and misleading. Purchasers of the various "Selected Group Offers" did not receive the magazines selected and paid for, but in many instances failed to receive any magazines and in many other instances received only a part of their selection, or magazines other than those selected. Respondents did not give either books or subscriptions to magazines free with any of the various "Selected Group Offers" listed in their contracts. The list of items comprising each "Selected Group Offer" included such so-called free goods and the various "Selected Group Offers" so listed were regularly and customarily offered for sale and sold by the respondents at the price set forth in said contracts and the price of the so-called free goods, represented by respondents as belonging to or accompanying any particular "Selected Group Offer," whether books or subscriptions to magazines, was actually included in and made a part of the price regularly and customarily charged by respondents for that particular "Selected Group Offer" and set forth in respondents contracts as such. The books sold and distributed by the respondents were not original, standard, unabridged editions, but were monographs or condensed articles by the authors named and were not ex-

pensively bound or printed, and were not worth \$6 a volume, but were cheaply bound and printed on a cheap grade of paper.

PAR. 6. The use by respondents of the foregoing, false, deceptive, and misleading representations, and others of a like nature, but not specifically set out herein, has had the tendency and capacity to, and did, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' "Selected Group Offers" of books and magazines.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 21st day of November 1941 issued and subsequently served its complaint in this proceeding upon the respondents, John F. Eberhard, Walter J. Keavney, and Edmund Diaz, individuals, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of answer thereto by respondent Edmund Diaz (the remaining respondents not having filed an answer), testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint, answer thereto, testimony, and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, and brief in support of the complaint (no brief having been filed by the respondents or oral argument requested); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, John F. Eberhard, is an individual, residing at 148 Marcellus Road, Mineola, Long Island, N. Y. Respondent, Walter J. Keavney, is an individual, whose business address is in

care of the Transportation and Express Department of Time, Inc., 330 East Twenty-second Street, Chicago, Ill. Respondent, Edmund Diaz, is an individual, doing business under the trade name of Physicians' Circulation Service, with his principal place of business located at 11 West Forty-second Street, New York, N. Y.

PAR. 2. During the periods of time hereinafter mentioned, the respondents, individually and as officers and representatives of corporations hereinafter described, have been engaged in the sale and distribution of scientific books, magazines, and periodicals by means of various combination or group offer plans whereby the respondents offered to purchasers and prospective purchasers a combination subscription to several magazines and periodicals, to be selected by the purchaser from a list of popular and scientific magazines and periodicals submitted by the respondents, together with the delivery by the respondents of one or more scientific books at a combination price designated by the respondents. Respondents have caused such books, magazines, and periodicals, when sold, to be transported from respondents' places of business in the State of New York and from the publishers' places of business to purchasers thereof located in various States of the United States other than the State of New York and the States in which the places of business of the publishers of said scientific books, magazines, and periodicals were located. Respondents, at all times mentioned herein, have maintained a course of trade in said books, magazines, and periodicals in commerce among and between the various States of the United States.

PAR. 3. In 1933 respondents, John F. Eberhard, Walter J. Keavney, and Edmund Diaz, became associated with a corporation known as Cyclopedia Sales Corporation, which corporation was engaged in the sale and distribution of scientific books, magazines, and periodicals by means of certain combination or group offer plans. In 1934 the name of the corporation was changed to Cyclopedia Corporation of America, and thereafter John F. Eberhard and Walter J. Keavney, as president and vice president, respectively, acquired all the stock of the corporation and were the sole operating officials. Respondent, Edmund Diaz, was district sales manager and salesman for said corporation.

The methods of doing business adopted by the respondents in operating the Cyclopedia Corporation of America were substantially the same as those followed by respondents in operating the subsequent organizations hereinafter described. The usual and customary method of doing business was for the respondents, both directly and through salesmen, to induce purchasers to sign contracts providing for the pur-

chase of several subscriptions to various popular or scientific magazines or periodicals, together with the purchase of certain scientific books at specified combination or group prices, all of which books, magazines, and periodicals were selected by the purchaser from lists furnished by the respondents. Such contracts provided for a part payment in cash with the order, a second payment upon delivery of the scientific books, and final payment upon receipt of bill from the respondents. The moneys so received from said contracts were placed in the general fund of the corporation, from which were paid the expenses of the administration of the business and the amount due publishers for the subscription price of the various magazines and periodicals requested by the purchasers.

The Cyclopedia Corporation of America was unable to fill a large number of contracts with its subscribers and in 1937 said Cyclopedia Corporation of America became insolvent and offered its creditors a reorganization plan under Section 77 (b) of the Bankruptcy Act. The creditors accepted the plan, which resulted in the organization of a corporation known as the Professional Circulation Co., Inc., with respondents, John F. Eberhard and Walter J. Keavney as sole owners and officers, and respondent, Edmund Diaz, as sales manager and salesman. The Professional Circulation Co., Inc., took over all the assets and business of Cyclopedia Corporation of America and continued to conduct, in the same manner and with the same sales force, the sale of various magazines, periodicals, and scientific books under the same combination or group offer plan.

In 1938 the Professional Circulation Co., Inc., became insolvent and was unable to meet its obligations or fulfill its contracts with its subscribers and failed to remit the subscription price to the publishers of the various magazines requested by such subscribers, and respondents, John F. Eberhard and Walter J. Keavney, as officers of said corporation, executed an assignment for the benefit of creditors to one Percy Croce, who proceeded, as assignee, to liquidate the assets of the corporation.

Immediately after the execution of said assignment for the benefit of creditors, the respondents, John F. Eberhard and Edmund Diaz organized a new corporation known as Professional Sales Corporation. Respondent, Edmund Diaz, was designated as secretary of said corporation. There is some question in the record as to whether the organization of the Professional Sales Corporation was fully completed as a corporation, but in any event respondent, John F. Eberhard, as sole owner, and respondent, Edmund Diaz, as sales manager, continued to operate said business and to sell scientific books, magazines, and

periodicals under the same combinations or group offer plan previously used by the respondents as hereinbefore described. Respondent, John F. Eberhard, continued to operate under the name Professional Sales Corporation until about August 1939, at which time he again became unable to meet his obligations or to fulfill the contracts with the purchasers of his combination or group offer plans and again made an assignment for the benefit of creditors. Shortly prior to this, in March 1939, respondent, Edmund Diaz, resigned his position as sales manager and discontinued his connection with the respondent, John F. Eberhard.

PAR. 4. In the course and conduct of their business as hereinbefore described and during the times hereinbefore mentioned, the respondents engaged in a practice of representing to purchasers and prospective purchasers:

1. That purchasers of scientific books, magazines, or periodicals under any of respondents' combination or group offer plans would receive the books, magazines, and periodicals listed in such plan upon payment of the purchase price.

2. That various books or magazines were given free to purchasers in or with respondents' various combination or group offer plans.

3. That the scientific books sold and distributed by the respondents in or with the various combination or group offer plans were original, standard, unabridged editions expensively bound and printed and worth at least \$6 a volume.

PAR. 5. The foregoing representations were false, deceptive, and misleading. It has been the practice of the respondents from time to time and on many occasions to collect the subscription price for the magazines and periodicals listed in their combination or group offers without remitting such subscription price or any part thereof to the publishers of the magazines requested, with the result that such purchasers have failed to receive any magazine or periodical or in some instances only part of their selection, or magazines and periodicals other than those ordered. Respondents did not give either scientific books or subscriptions to any magazine or periodical free with, or as a part of, any combination or group offer. The items which the respondents and their salesmen have represented as being free were in fact usually and customarily included by the respondents in their various combination and group offer plans for the price set forth in respondents' contracts, and the price of such so-called free items was actually included in, and made a part of, the price regularly and customarily charged by respondents for the particular combination or group offer. The scientific books sold and distributed by the respond-

ents were not original, standard, unabridged editions, but were monographs or condensed articles by the authors named, and were not expensively bound or printed and were not worth \$6 a volume, but were cheaply bound and printed on a cheap grade of paper.

PAR. 6. The use by the respondents of the foregoing false, deceptive, and misleading representations and others of similar nature not specifically set out herein has had the tendency and capacity to, and did, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' selected group offers of books and magazines.

CONCLUSION

The aforesaid acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of respondent, Edmund Diaz, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, and brief filed in support of the complaint; and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, John F. Eberhard, Walter J. Keavney, and Edmund Diaz, individuals, and their respective representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of scientific books, magazines, periodicals, or other similar publications in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that purchasers of books, magazines, or periodicals sold by the respondents, or any of them, will receive the books, magazines, or periodicals selected, upon payment of the purchase price, when such purchasers do not receive any of such books, magazines, or periodicals or receive books, magazines, or periodicals other than those selected by such purchasers or receive only part of such selection.

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2. Representing that purchasers of subscriptions to magazines or periodicals offered by the respondents, or any of them, will receive the magazines or periodicals so selected, upon payment of the purchase price, when the respondents do not remit the subscription price to the publishers or distributors of the magazines or periodicals selected so that the name of such purchaser can be entered as a subscriber to the magazine or periodical selected.

3. Representing that any book, magazine, or periodical is given free to purchasers, which is regularly included in a combination offer with other books, magazines, or periodicals and the price of such item, represented as being free, is included in and made a part of the price regularly and customarily charged for the particular combination offer.

4. Representing that any book offered for sale by the respondents, or any of them, is an original, standard, or unabridged edition, or that it is expensively bound and printed when such book is a monograph or condensed article cheaply bound and printed on a cheap grade of paper.

5. Representing as the customary or regular price or value of any of respondents' books, any price or value which is in fact in excess of the price at which said books are customarily offered for sale and sold in normal and usual course of business.

It is further ordered, That the respondents shall, within 60 days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

Syllabus

IN THE MATTER OF

NEO GRAVURE PRINTING CO., INC., ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 4781. Complaint, July 9, 1942—Decision, May 24, 1943

Where (1) a corporation which maintained a printing establishment equipped for rotogravure printing of magazine sections for periodicals and catalogs; (2) two other corporations which had long engaged as exporters and importers doing business with foreign buyers and sellers in foreign countries, one particularly in Central America and the West Indies; and (3) an individual associated with them in the interstate sale of "Manufacturers' Displays" for "Export Catalogs" to manufacturers of numerous types of merchandise; engaged in the interstate sale to such manufacturers of such "Displays" and in maintaining a course of interstate and foreign trade therein and in the "Export Catalogs" which they compiled therefrom, some of which bore the name of one or the other of said export concerns;

By means of letters and the solicitation of said individual in cooperation with the others, and through salesmen working under his direction and by other means—

- (a) Represented and implied to American manufacturers that a definite demand existed from foreign customers of said export concerns for the merchandise made by the manufacturers whose "Displays" were accepted for insertion in their "Export Catalogs," and that such manufacturers would have good reason to expect that said concerns would each purchase from them for their foreign customers a considerable quantity of merchandise;
- (b) Represented that said export concerns' "Export Catalogs" were permanent catalogs, constituted a valuable sales help to their representatives in the more important foreign-trade centers and an important feature in their established and usual methods of securing business, and that use thereof had resulted in an important part of their foreign sales of American merchandise;
- (c) Represented that the business operations of said export concerns were dependent upon foreign business received by them through the use of their "Export Catalogs" containing "Displays" of American merchandise and that the insertion by manufacturers of their displays in said catalogs, and their furnishing of price lists and descriptive material ordinarily used in the sale thereof, would enable said concerns to sell such merchandise to their foreign customers, and that such an arrangement would act as an economical means to said manufacturers of securing profitable foreign business;

The facts being that no foreign market or demand existed or was likely to exist for any of the merchandise concerned; and such "Export Catalogs" were in no sense permanent, were not a feature in their established and usual method of procuring business, and played no essential part in their foreign sales of American merchandise, but the cooperative arrangement in question was entered into solely to make a profit from the sale of the printed advertising matter concerned;

- (d) Represented that the money required to be paid by the manufacturers pursuant to agreements covering the insertion of their "Displays" in said "Ex-